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Supreme Court, U.S.
FILED

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Docket Number _____

In The

SUPREME COURT OF THE UNITED STATES

October Term 1997

FRANK PAUL LUKACS,

Petitioner,

v.

HONORABLE DONNA E. SHALALA, ET AL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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56 pp

QUESTIONS PRESENTED FOR REVIEW

I. Did the district court abuse its discretion in denying appellant's motion for a preliminary and permanent injunction on the United States federal government's Federal Equal Opportunity Recruitment Program (FEORP), which is the federal government's so called affirmative action program for minorities and females and hispanics, without ever conducting the appropriate inquiry and analysis and review of the factors of *Blackwelder Furniture Co. v. Seilig Manufacturing Co., Inc.*, 550 F.2d 189 (4th Cir. 1977) regarding motions for injunctive relief as required in the Fourth Circuit, and without complying with the Federal Rules of Civil Procedure Rule 52(a) which specifically states that "and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action".

II. Absent extraordinary circumstances, such as a demonstrated history of frivolous and vexatious litigation, or a failure to comply with sanctions imposed for such conduct, does a district court have the power to prevent a party from filing pleadings, motions, affidavits, or appeals authorized by the Federal Rules of Civil Procedure.

LIST OF ALL PARTIES TO THE PROCEEDING

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CITATIONS OF THE REPORTS

The judgment of the Fourth Circuit Court of Appeals, Lukacs v. Shalala, No. 97-2047 (4th Cir. Jan. 26, 1998) is attached as Appendix A. (A petition for rehearing shall be filed with the Fourth Circuit Court of Appeals by July 13, 1998 on Lukacs v. Shalala, No. 98-1490 (4th Cir. May 27, 1998).)

BASIS FOR JURISDICTION

Petitioner appeals from the Fourth Circuit Court of Appeals judgment entered in Case Number 97-2047 on January 26, 1998 (Appendix A). Petitioner's Petition for Rehearing in Case Number 97-2047 was denied by the Fourth Circuit Court of Appeals on April 06, 1998 (Appendix B).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THIS CASE

The citations of the relevant Constitutional provisions, statutes, and regulations involved in the case follow, with their pertinent text set out verbatim in the appendix (Appendix C).

Fourteenth Amendment Equal Protection Clause of the United States Constitution

Fifth Amendment Due Process Clause of the United States Constitution

42 U.S.C. §2000e, et seq. under Title VII

of the Civil Rights Act of 1964

5 U.S.C. §7201 (a), 5 U.S.C. §7201 (c), 5 U.S.C. §7201 (d)

5 C.F.R. §720.202 (a), 5 C.F.R. §720.202 (e), 5 C.F.R. §720.205 (c)

Attachment 1 to FPM Letter 720-2, Office of Personnel Management (OPM), Federal Personnel Manual (FPM)

Department of Health and Human Services (DHHS) Career Opportunity Training Agreement (COTA)

STATEMENT OF THE CASE

Petitioner from the date of his first Equal Employment Opportunity ("EEO") complaint at the National Institutes of Health ("NIH") in January of 1991, despite his having applied on an average of about once every month for advertised job vacancy announcements, and having filed over sixty separate EEO complaints, has never once in all this time ever been selected for a so called affirmative action designated or Federal Equal Opportunity Recruitment Program ("FEORP") designated or Affirmative Employment Program ("AEP") designated opening, and in effect set aside for minorities and women and hispanics.

Petitioner is a member of a protected group, since petitioner is a white male. Petitioner has applied for numerous job vacancy announcements and benefits.

Petitioner was qualified for these numerous job vacancy announcements and benefits. Petitioner was rejected for these numerous job vacancy announcements and benefits. These positions or benefits either remained open and the employer continued to seek applicants, or else the positions or benefits were given to members outside of the protected group of white males. Petitioner was rejected for these positions under circumstances giving rise to an inference of unlawful discrimination, especially all of the circumstances and countless elements of so called affirmative action, FEORP, and AEP.

Defendants have not articulated any, much less any legitimate, nondiscriminatory reason for most of the employment actions or denial of benefits. In those few cases where Defendants have articulated reasons for the employment actions or denial of benefits, defendants' reason was a mere pretext for discrimination or simply not credible.

As an example, in one so called affirmative action job vacancy announcement for which petitioner applied and was not selected, two non white male so called COTA "trainees" were instead selected.

As an example, in one so called affirmative action job vacancy announcement for which petitioner applied and was not selected, no white males were even

interviewed, contrary to the rules.

As an example, in one so called affirmative action job vacancy announcement for which petitioner applied and was not selected, twelve out of the twelve selected were women or minorities, with no white males having been selected.

Petitioner maintains that despite petitioner's high qualifications and demonstrated merit for these positions, he was effectively precluded from being seriously considered for these so called affirmative action programs. Petitioner maintains that since these positions had been designated as "FEORP" or "AEP" positions, that in actuality only Office of Personnel Management ("OPM") recognized minorities and women were being seriously considered for these positions.

Petitioner has applied for several dozen FEORP and AEP designated positions and benefits during the past several years, but petitioner since his first EEO complaint in January of 1991 to date has never been selected for either a FEORP designated opening or an AEP designated opening either at the NIH, at DHHS, or anywhere else in the entire United States federal government. Petitioner maintains that because he is a caucasian male, and is over forty years of age and is a first generation legal immigrant of Hungarian ancestry, his career in the federal government has been limited to a few job series which are

non-FEORP designated and non-AEP designated positions and that he has been forced to follow a career path that is outside of the "mainstream occupations", or highly populous occupations which tend to lead to higher level positions in the agency. Petitioner maintains that over the past several years that he has been repeatedly denied selections and promotions and opportunities for career advancement, and that he has been forced to leave entire career paths, and that he has been forced to leave entire Institutes within NIH because of affirmative action programs which have discriminated against him as an old white male of Hungarian ancestry, and because of the retaliation and reprisal following Plaintiff's filing of EEO complaints challenging the discrimination of these affirmative action programs.

Petitioner maintains that because of the above enumerated rules, regulations, and laws relating to affirmative action, especially under the Federal Equal Opportunity Recruitment Program and Affirmative Employment Programs, that there is a real and immediate threat that he will again suffer similar injury in the future. Petitioner's allegation that the federal government's use of affirmative action denies him equal protection of the laws, with the injury being that the discriminatory classifications prevent the petitioner from competing on an equal footing,

satisfies the requirement that this is an invasion of a legally protected interest that is concrete and particularized. Petitioner maintains that the laws, rules, and regulations of the federal government's affirmative action programs, with no end in sight have moved from being just a temporary remedy to being a permanent entitlement of preferences and favoritism for minorities, women, and hispanics, and as such they will last longer than the discriminatory effects they are designed to eliminate, and as such have become timeless in their ability to affect the future. Petitioner maintains that the evidence that the federal government intends to permanently continue the above enumerated rules, regulations, and laws relating to affirmative action, especially under the Federal Equal Opportunity Recruitment Program and Affirmative Employment Program, and that Petitioner has repeatedly in the past and shall continue repeatedly in the future to apply for job vacancy announcements in the federal government with discriminatory classifications which prevent the petitioner from competing on an equal footing, satisfies the requirement that the invasion of the legally protected interest is actual and imminent.

Since a review of a judgment of a United States court of appeals is sought, the basis for federal jurisdiction in the court of first

instance was initially stated as "Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331 and §1343. Authority for this Complaint is provided in the Fourteenth Amendment Equal Protection Clause of the United States Constitution, by the Fifth Amendment Due Process Clause of the United States Constitution, by 42 U.S.C. §2000e, et seq. under Title VII of the Civil Rights Act of 1964, and under 29 U.S.C. §621, et seq."

On June 18, 1997, Petitioner filed a motion for partial summary judgment, or in the alternative for declarative relief, or in the alternative for injunctive relief, pursuant to Rule 65 of the Federal Rules of Civil Procedure, on the finding and conclusion that a) no compelling governmental interest exists which constitutionally protects or permits continuation of the federal government Federal Equal Opportunity Recruitment Program (FEORP) and b) that the means employed by FEORP are not narrowly tailored measures, and Petitioner further sought to enjoin and prohibit the use of affirmative action based on race or gender or national origin on any of the elements of the so called affirmative action FEORP programs of the United States federal government, including but not limited to: The legislation of 5 U.S.C. §7201 (a), the legislation of 5 U.S.C. §7201 (c), the legislation of 5 U.S.C. §7201 (d); the regulations which implement these statutes,

the Federal Equal Opportunity Recruitment Program FEORP, and the Affirmative Employment Program AEP; The Federal Equal Opportunity Recruitment Program regulations on underrepresentation and classifications on the basis of race and gender and national origin, including but not limited to, elements of 5 C.F.R. §720.202 (e), especially those referring to qualifiable minorities and women, elements of 5 C.F.R. §720.202 (a), especially those referring to women, and elements of 5 C.F.R. §720.205 (c), especially those referring to the appropriate labor force; the Equal Employment Opportunity Commission's responsibility to establish and maintain discriminatory affirmative action programs for minorities and females under FEORP, and the EEOC's dual mutually exclusive function to ensure real equal employment opportunity regardless of race or sex or national origin or age; the preferences and favoritism for minorities and women under FEORP and AEP and the Career Opportunities Training Agreement COTA; the failure of the United States government to seriously consider, interview, or select white males for Federal Equal Opportunity Recruitment Program FEORP designated job openings; the exclusion of relevant qualifications from consideration for Federal Equal Opportunity Recruitment Program FEORP designated job openings; and the Office of Personnel Management OPM Federal Personel

Manual FPM classification of minorities by race and national origin under the Federal Equal Opportunity Recruitment Program FEORP, especially Attachment 1 to FPM Letter 720-2.

The United States Court of Appeals for the Fourth Circuit stated that "We find that the district court did not abuse its discretion in dismissing Petitioner's Motion for Injunctive Relief. See *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195-196 (4th Cir. 1977). Accordingly we affirm the denial of injunctive relief."

However, the district court never addressed any of the required *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195-196 (4th Cir. 1977) factors, or any factors for that matter, and violated Federal Rules of Civil Procedure Rule 52(a) which specifically states that "in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action". Thus the opinion is in conflict with another decision of the Court or of another court of appeals.

REASONS FOR ALLOWANCE OF THE WRIT

MOTION FOR INJUNCTIVE RELIEF ON FEORP FEDERAL EQUAL OPPORTUNITY RECRUITMENT PROGRAM

The order denying Petitioner's motion for

a preliminary injunction and a permanent injunction on the federal government's Federal Equal Opportunity Recruitment Program (FEORP), which is the federal government's so called affirmative action program for minorities and females and hispanics, is an important question of federal law that has not been, but should be settled by the Supreme Court, with the United States Court of Appeals for the Fourth Circuit having decided this important federal question in a way that conflicts with relevant decisions of the Supreme Court.

The Court of Appeals for the Fourth Circuit has entered a decision in conflict with the decision of its own and that of another United States court of appeals on the same important matter when it did not order that the district court conduct an appropriate inquiry and review of the relevant factors, in the case of the Court of Appeals for the Fourth Circuit the relevant *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195-196, (4th Cir. 1977) factors regarding motions for injunctive relief, and when the Court of Appeals for the Fourth Circuit did not order that the district court comply with the Federal Rules of Civil Procedure Rule 52 (a) which specifically states that "and in granting or refusing interlocutory injunctions the court shall

similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action".

> "We believe the analysis required by our decision in *Blackwelder Furniture Co. v. Seilig Manufacturing Co., Inc.*, 550 F.2d 189 (4th Cir. 1977), still applies. Because we are insufficiently apprised of the basis for the district court's ruling on the preliminary injunction here, we remand the case for further proceedings. ... We have noted the difficulties that plaintiff faces in securing a preliminary injunction. We believe, nonetheless that plaintiff is entitled to an appropriate review on its application. On the record before us, however, it is not possible to determine the rationale that guided the district's refusal to grant the injunction or whether Hughes had a legitimate claim to preliminary injunctive relief under any theory. ... While we might try to evaluate the relevant Blackwelder factors ourselves, we believe the district court is in much the better position to do so. On remand, the district court must determine as a threshold matter whether the harm Hughes will suffer absent the lockbox rises to the level of irreparability. ... If on remand, the district court finds that

> Hughes is threatened with the kind of harm described above, it must then turn to the other Blackwelder factors. ... We recognize the value in not permitting a lawsuit to be bogged down in the *Blackwelder* factors, but neither do we think the inquiry required by that decision is one that can be ignored. For the foregoing reasons, the judgment of the district court is vacated and remanded with instructions."

Hughes Network Sys. v. Interdigital Corp., 17 F.3d 691, at 692-696 (4th Cir. 1994).

> "Although a hearing is not an absolute prerequisite to a ruling on a motion for a preliminary injunction, the court must make findings of fact and conclusions of law as required by Rule 52(a), so that its reasons for denying preliminary relief can be discerned from the record. *Williams v. McKeithen*, 939 F.2d 1100 (5th Cir. 1991); *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172 (3d Cir. 1990)."

Moore's Federal Practice, Federal Civil Rules 1997, by James Moore, published by Matthew Bender & Company, New York, page 697, §65.3.

> "After providing that in all non-jury actions tried upon the facts, the court shall find the facts specially and state separately its conclusions of law thereon, Rule 52(a) goes on to state

> that "in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action". And the appellate court is normally justified in vacating the order and remanding for fuller explanation where the trial judge's findings and conclusions lack specificity. *Schmidt v. Lessard*, 414 U.S. 473, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974) (citing Moore's)."

Moore's Federal Practice, Federal Civil Rules 1997, by James Moore, published by Matthew Bender & Company, New York, page 700, §65.7.

> "*Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169-170 (11th Cir. 1988) (district court abused its discretion in denying motion for preliminary injunction without evidentiary hearing because, in Title VII (42 U.S.C. §§ 2000e-2000e-17) actions, irreparable harm is presumed and hearing would have determined whether defendant could have overcome presumption and whether plaintiff had met other requirements for injunction)."

13 *Moore's Federal Practice*, § 65.21 [1] (Matthew Bender 3d ed.).

As Petitioner has previously stated in his "memorandum in support of plaintiff's

motion for a preliminary injunction or in the alternative a permanent injunction according to F.R.C.P Rule 65 on the federal government Federal Equal Opportunity Recruitment Program (FEORP)", which is the United States federal government's so called affirmative action program, in Petitioner's fourth and fifth complaints PJM-97-3483 and PJM-97-3495 dated 01/26/98:

> "The Supreme Court has said that the traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance, the plaintiff will suffer irreparable injury and also that the plaintiff is likely to prevail on the merits. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975). See also *In re Y & A Group Sec. Litig.*, 38 F.3d 380 (8th Cir. 1994). ... *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160 (5th Cir. 1993) (where constitutional rights have been infringed upon, the threat of irreparable injury and disservice to the public interest is clear)."

Moore's Federal Practice, Federal Civil Rules 1997, by James Moore, published by Matthew Bender & Company, New York, page 696, §65.3.

> "An adequate remedy at law may be deemed unavailable if legal redress may be obtained only by commencement of

> multiple actions, such as when the defendants repeatedly commits allegedly harmful acts. ... Multiple actions necessary for legal remedy. See *Lee v. Bickell*, 292 U.S. 415, 421, 54 S. Ct. 727, 78 L. Ed. 1337 (1934) (necessity for multiplicity of actions for legal remedy was sufficient to uphold injunction); *Ecolab, Inc. v. Paolo*, 753 F. Supp. 1100, 1110 (E.D.N.Y. 1991) ("If plaintiff can receive legal relief only through a multiplicity of lawsuits, plaintiff has suffered irreparable harm sufficient to warrant a preliminary injunction".). ... Repeated harmful actions. See, e.g., *Northeast Women's Ctr., Inc., v. McMonagle*, 665 F. Supp. 1147, 1153 (E.D. Pa. 1987) ("The legal remedy is inadequate if the plaintiff's injury is a continuing one, where the last available remedy at law would relegate the plaintiff to filing a separate claim for damages each time it is injured anew.").

13 *Moore's Federal Practice*, § 65.02 [2] (Matthew Bender 3d ed.).

> "Presumption of irreparable injury in other civil rights cases. ... *Able v. United States*, 847 F. Supp. 1038, 1043 (E.D.N.Y. 1994) ("[P]ossible violation of constitutional rights [under Fifth and First Amendments] constitutes

irreparable harm."). *Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 543 F. Supp. 198, 218 (S.D. Tex. 1982) ("Victims of discrimination suffer irreparable injury, regardless of pecuniary damage."). *Gresham v. Windbrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir.), cert. denied, 469 U.S. 882 (1984) (housing discrimination "almost always results in irreparable injury")."

13 *Moore's Federal Practice*, § 65.22 [4] (Matthew Bender 3d ed.).

"The standard for preliminary injunctions is established in this Circuit by *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977). *Blackwelder* clarified that a hardship balancing test applies to determine the granting or denial of a preliminary injunction. See *L.J. By and Through Darr v. Massinga*, 838 F.2d 118 (4th Cir. 1988), cert. denied, 488 U.S. 1018, 109 S.Ct. 816, 102 L.Ed.2d 805 (1989). Four factors must be considered: (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted, (3) the likelihood that the plaintiff will

> **succeed on the merits, and (4) the public interest. *Massinga*, 838 F.2d at 120.** The irreparable harm to the plaintiff and the harm to the defendant are the two most important factors. If, after balancing those two factors, the balance "tips decidedly" in favor of the plaintiff, see *Merrill Lynch*, 756 F.2d at 1054, a preliminary injunction will be granted if "the plaintiff has raised serious questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation". *Blackwelder*, 550 F.2d at 195; see *Todd by Todd v. Sorrell*, 841 F.2d 87, 88 n.2 (4th Cir. 1988). As the balance tips away from the plaintiff, a stronger showing on the merits is required. See *Telvest, Inc. v. Bradshaw*, 618 F.2d 1029 (4th Cir. 1980)."

Rum Creek Coal Sales v. Caperton, 926 F.2d 353, 359-361 (4th Cir. 1991)

> "Cf. *Zepeda*, 753 F.2d at 727 (finding that plaintiffs "demonstrated a possibility of irreparable injury by showing violations of their constitutional rights, which if proven at trial, could not be compensated adequately by money damages and by

> showing that the INS was reasonably likely to continue those practices"). ... Similarly, the loss of First Amendment rights for even a short time has been considered irreparable injury. See *Elrod V. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)."

Rum Creek Coal Sales v. Caperton, 926 F.2d 353, 359-361 (4th Cir. 1991).

City of Richmond v. J.A. Croson Company

City of Richmond v. J.A. Croson Company, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854, decided by the Supreme Court of the United States on January 23, 1989, is rather instructive for as Justice Marshall himself writes in his dissenting opinion "Today, for the first time, a majority of this Court has adopted strict scrutiny as the standard of Equal Protection Clause review of race - conscious remedial measures", *City of Richmond v. J.A. Croson Company*, 488 U.S. at 551, 109 S.Ct. at 752, and is in itself probably sufficient to defeat most of the individual elements of FEORP and AEP.

> "The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination. ... The gross overinclusiveness of Richmond's racial

> preference strongly impugns the city's claim of remedial motivation. See *Wygant v. Jackson Board of Education*, 476 U.S., at 284, n. 13, 106 S.Ct. at 1852 n. 13 (haphazard inclusion of racial groups "further illustrates the undifferentiated nature of the plan"); see also Days, "*Fullilove*", 96 Yale L.J. 453, at 482 ("Such programs leave one with the sense that racial and ethnic groups favored by the set-aside were added without attention to whether their inclusion was justified by evidence of past discrimination")." (*City of Richmond v. J. A. Croson Company*, 488 U.S. at 506-507, 109 S.Ct. at 728-729.)

The Supreme Court in the *City of Richmond v. J.A. Croson*, which case in itself by totally negating the very misrepresentation of the very definition of "underrepresentation" would have done away with the federal government FEORP and AEP, even without applying strict scrutiny against the federal government, reaffirmed that

> "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value. *Hazelwood School District v. United States*, 433 U.S. 299,

> at 307-308, n. 13, 97 S.Ct. 2736, at 2742 n. 13. (1977)" and "Where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task. See *Hazelwood School District v. United States*, 433 U.S. 299, at 308, 97 S.Ct. at 2736, at 2741 (1977); *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 651-652, 107 S.Ct. 1442 (1987)." (*City of Richmond v. J.A. Croson Company*, 488 U.S. 469, at 501-502, 109 S.Ct. 706, at 725-726 (1989).)

Adarand Constructors, Inc. v. Pena

Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097, 132 L.Ed.2d 158, 63 USLW 4523, (U.S.Colo., Jun 12, 1995) is now the dispositive Supreme Court of the United States case for the facts and issues presented by Petitioner, although *Croson* would have been sufficient for most of the individual elements of FEORP and AEP:

> "Adarand, in addition to its general prayer for "such other and further relief as to the Court deems just and equitable," specifically seeks declaratory and injunctive relief against any future use of subcontractor

compensation clauses. ... If Adarand is to maintain its claim for forward-looking relief, our cases require it to allege that the use of subcontractor compensation clauses in the future constitutes "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (footnote, citations, and internal quotation marks omitted). Adarand's claim that the Government's use of subcontractor compensation clauses denies it equal protection of the laws of course alleges an invasion of a legally protected interest, and it does so in a manner that is "particularized" as to Adarand. We note that, contrary to respondent's suggestion, see Brief for Respondents 29-30, Adarand need not demonstrate that it has been, or will be, the low bidder on a government contract. The injury in cases of this kind is that a "discriminatory classification prevents the plaintiff from competing on an equal footing." *General Contractors v. Jacksonville*, 508 U.S. 655, ---, 113 S.Ct. 2297, 2304, 124 L.Ed.2d 586 (1993). The aggrieved party "need not allege that he would have

obtained the benefit but for the barrier in order to establish standing." *Id.*, at ---, 113 S.Ct., at 2303. It is less clear, however, that the future use of subcontractor compensation clauses will cause Adarand "imminent" injury. We said in *Lujan* that "[a]lthough "imminence" is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to insure that the alleged injury is not too speculative for Article III purposes -- that the injury is "certainly impending."" *Lujan*, supra at 565, n.2, 112 S.Ct. at 2138, n. 2. We therefore must ask whether Adarand has made an adequate showing that sometime in the relatively near future it will bid on another government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors. We conclude that Adarand has satisfied this requirement." (*Adarand Constructors, Inc. v. Pena*, 115 S.Ct. at 2104-2106.)

"A majority of the Court in *Croson* held that "the standard of review under Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification," and that the single standard of review for racial

classifications should be "strict scrutiny". *Richmond v. J.A. Croson Co.*, 488 U.S. at 493-494, 109 S.Ct. at 722. ... any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest scrutiny." (*Adarand Constructors, Inc. v. Pena*, 115 S.Ct. at 2110-2112.)

"[A]ll governmental action based on race -- a group classification long recognized as "in most circumstances irrelevant and therefore prohibited," *Hirabayashi*, supra at 100, 63 S.Ct. at 1385 -- should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection, and holding "benign" state and federal racial classifications to different standards does not square with them. "[A] free people whose institutions are founded upon the doctrine of equality," ibid., should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons.

> Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." (*Adarand Constructors, Inc. v. Pena*, 115 S.Ct. at 2112-2114.)

A COURT HAS NO POWER TO PREVENT A PARTY FROM FILING PLEADINGS, MOTIONS, AFFIDAVITS, OR APPEALS AUTHORIZED BY THE FEDERAL RULES OF CIVIL PROCEDURE

The United States Court of Appeals for the Fourth Circuit has entered a decision in conflict with the decision of another United States court of appeals on the same important matter when the Court of Appeals for the Fourth Circuit did not issue an order directing the district court to allow the filing of all pleadings, motions, affidavits, and appeals authorized by the Federal Rules of Civil Procedure.

The United States Court of Appeals for the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by

a lower court, as to call for an exercise of the Supreme Court's supervisory power when it did not issue an order directing the district court to allow Petitioner Pro Se the filing of all pleadings, motions, affidavits, and appeals authorized by the Federal Rules of Civil Procedure, and when it did not issue an order directing that the district court comply with the Federal Rules of Civil Procedure Rule 52 (a) which specifically states that "and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action", and when it did not issue an order directing that the district court comply with the Federal Rules of Civil Procedure Rule 56(c) which specifically states that "(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits.", (with the rule itself being plural, namely "affidavits", and not in the singular, namely "affidavit").

In the words of the Fourth Circuit of Appeals "Appellant appeals the district court's orders" ... "(2)" ... "directing that all parties file no further motions", with the specific language of the order being that "the

parties are directed to file no further motions".

In PJM-96-2913, Petitioner Pro Se has specifically wanted to file a motion for an injunction according to FRCP Rule 65 on the National Institutes of Health FEORP and AEP and so called affirmative action programs, (a copy of which was actually filed but which motion was physically returned to Petitioner Pro Se), a motion to amend the complaint, (which motion according to the Department of Justice "clearly violates the Court's June 30, 1997 Order", and that "Absent a favorable ruling from the Fourth Circuit, plaintiff is clearly without authority to file the present Motion"), a motion for consolidation of the five federal court complaints of Petitioner, affidavits according to Rule 56(c), including the 103 page "Affidavit" with its attached inch thick section of 52 "Exhibits" dated June 13, 1997 again, which was denied and which the district court refused to consider, as well as other affidavits and exhibits, (which declarations and affidavits Petitioner Pro Se had a right to file according to FRCP Rule 56 Summary Judgment which specifically states that "(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits.", with the rule itself being plural, namely "affidavits", and not in

the singular, namely "affidavit"), but since Petitioner thought that "the filing of anything further in this Court, in the absence of the exhaustion of such appellate scrutiny, will constitute an act of contempt, for which appropriate sanctions will issue" (to use the words of *In re Halliburton*), Petitioner Pro Se was quite honestly afraid to file anything, even though he had every right to file them according to the Federal Rules of Civil Procedure.

Petitioner Pro Se is appealing the district court's orders returning to Petitioner his Motion for Injunctive Relief, pursuant to Rule 65 of the Federal Rules of Civil Procedure, on the National Institutes of Health (NIH) Federal Equal Opportunity Recruitment Program (FEORP) and the National Institutes of Health (NIH) Affirmative Employment Program (AEP), which is the wording that Petitioner Pro Se used in his motion for a preliminary injunction and permanent injunction on the National Institutes of Health (NIH) so called affirmative action programs for minorities and females and hispanics, on the finding and conclusion that a) no compelling governmental interest exists which constitutionally protects or permits continuation of any of the National Institutes of Health so called affirmative action programs for minorities or females or hispanics, including but not limited to, the

NIH FEORP or the NIH AEP, and b) that the means employed by any of the NIH so called affirmative action programs for minorities or females or hispanics, including but not limited to, the NIH FEORP or the NIH AEP, are not narrowly tailored measures.

> **"While a judge may require parties to confer before filing a motion, the judge may not, by failing to hold a conference, prevent parties from filing. *Richardson Greenshields Securities Inc. v. Lau*, 825 F.2d 647 (2d Cir. 1987)." *Moore's Federal Practice, Federal Civil Rules 1997*, by James Moore, published by Matthew Bender & Company, New York, page 102, §7.3.**
>
> **"A court has no power to prevent a party from filing pleadings, motions, or appeals authorized by the Federal Rules of Civil Procedure." *Richardson Greenshields Securities Inc. v. Lau*, 825 F.2d 647, at 652 (2d Cir. 1987).**
>
> **"We may in appropriate circumstances treat an attempted appeal as a request for leave to file a petition for a writ of mandamus. [citations omitted] We believe that this is such an appropriate circumstance. ... Absent extraordinary circumstances, such as a demonstrated**

> **history of frivolous and vexatious litigation, ... or a failure to comply with sanctions imposed for such conduct, ... a court has no power to prevent a party from filing pleadings, motions, or appeals authorized by the Federal Rules of Civil Procedure."** ***Richardson Greenshields Securities Inc. v. Lau,*** **825 F.2d 647, at 652 (2d Cir. 1987).**

The quotation "absent extraordinary circumstances ... a court has no power to prevent a party from filing pleadings, motions, or appeals authorized by the Federal Rules of Civil Procedure" is repeated in 200 Westlaw citations, including *In re Halliburton Co.*, 991 F.2d 810, 1993 WL 118929, (Fed.Cir.(Tex.), March 12, 1993), *MacDraw, Inc. v. CIT Group Equipment Financing, Inc.*, 73 F.3d 1253, 1256 (2nd Cir.(N.Y.) 1996), *Milltex Industries Corp. v. Jacquard Lace Co., Ltd.*, 55 F.3d 34, at 39 (2nd Cir.(N.Y.) 1995), and *Schoenberg v. Shaposlky Publishers, Inc.*, 971 F.2d 926, 936 (2nd Cir.(N.Y.) 1992).

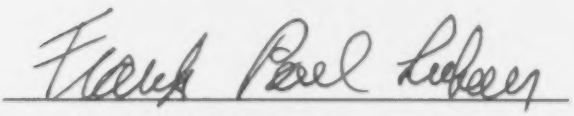
Petitioner has been in effect precluded from any meaningful action in the court proceedings or any meaningful **"access to the court system"**, *Moy v. United States*, 906 F. 2d 467, 470 (9th Cir. 1990). Petitioner has in effect had his **"constitutional right of access to the courts"**, (*Bounds v. Smith*, 430 U.S. 817, 821, 97 S. Ct. 1491, 1994, 52 L.Ed. 2d 72

(1977)) and **"his right to adequate, effective, and meaningful access"**, (*Bounds*, 430 at 822, 97 S.Ct. at 1495) to the courts curtailed and abridged. "It sanctions access restrictions that standing alone might or might not be objectionable but which **"taken together [are] so burdensome as to deny the litigant meaningful access to the courts"**, *In re Green*, 669 F. 2d 779, at 786, (D.C.Cir. 1981) (per curiam); *Abdullah v. Gatto*, 773 F.2d 487, at 488 (2d Cir. 1985) (per curiam)", *Procup v. Strickland*, 792 F.2d 1069, at 1078 (11th Cir. 1986) (en banc, per curiam).

CONCLUSION

Wherefore, Petitioner Pro Se hereby respectfully makes an application to the Court for an order granting Petitioner Pro Se's petition to the Supreme Court for a writ of certiorari.

Respectfully Submitted,



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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2047

FRANK PAUL LUKACS,
Plaintiff - Appellant,
v.
DONNA E. SHALALA, ET AL,
Defendants - Appellees.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Peter J. Messitte, District Judge. (CA-96-2913-PJM).

Submitted: January 15, 1998
Decided: January 26, 1998

Before MURNAGHAN and LUTTIG, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed in part and dismissed in party by unpublished per curiam opinion.

Frank Paul Lukacs, Appellant Pro Se. Earle Bronson Wilson, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent

in this circuit. See Local Rule 36 (c).

PER CURIAM:

Appellant appeals the district court's orders: (1) adopting the magistrate judge's recommendation and striking a portion of Appellant's 540 page brief in opposition to a Motion to Dismiss; (2) dismissing without prejudice twenty motions Appellant filed in relation to his civil complaint and directing that all parties file no further motions; and (3) returning to Appellant his Motion for Partial Summary Judgment and his Motion for Reconsideration of the order dismissing the twenty motions, both of which were filed after the court had ordered the parties not to file any additional motions.

We find the district court did not abuse its discretion in dismissing Appellant's Motion for Injunctive Relief. See Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 195-96 (4th Cir. 1977). Accordingly, we affirm the denial of injunctive relief.

We dismiss the appeal of the remaining orders for lack of jurisdiction because the orders are not appealable. This court may exercise jurisdiction only over final orders, 28 U.S.C. § 1292 (1994); Fed. R. Civ. P. 54 (b); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). The orders here appealed are neither final orders nor appealable interlocutory or collateral orders.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED IN PART, DISMISSED IN PART

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed April 6, 1998
No. 97-2047
CA-96-2913-PJM

FRANK PAUL LUKACS,
Plaintiff - Appellant,
v.
DONNA E. SHALALA, ET AL,
Defendants - Appellees.

On Petition for Rehearing
with Suggestion for Rehearing in Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX C

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THIS CASE

Fourteenth Amendment Equal Protection Clause of the United States Constitution

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fifth Amendment Due Process Clause of the United States Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

42 U.S.C. §2000e, et seq. under Title VII of the Civil Rights Act of 1964

42 U.S.C. §2000e-16 states that "All personnel actions affecting employees or applicants for employment ... shall be made free from any discrimination based on race, color, religion, sex, or national origin."

5 U.S.C. §7201 (a), 5 U.S.C. §7201 (c), 5 U.S.C. §7201 (d)

5 U.S.C. §7201 (a) states that "For the purpose of this section - (1) "underrepresentation" means a situation in which the number of members of a minority group designation (determined by the Equal Employment Opportunity Commission in consultation with the Office of Personnel Management, on the basis of the policy set forth in subsection (b) of this section) within a category of civil service employment constitutes a lower percentage of the total number of employees within the employment category than the percentage that the minority constituted within the labor force of the United States, as determined under the most recent decennial or mid-decade census, or

current population survey, under title 13".

5 U.S.C. §7201 (c) states that "the Office of Personnel Management shall, by regulation, implement a minority recruitment program which shall provide, to the maximum extent practicable - (1) that each Executive agency conduct a continuing program for the recruitment of members of minorities for positions in the agency to carry out the policy set forth in subsection (b) in a manner designed to eliminate underrepresentation of minorities in the various categories of civil service employment within the Federal service, with special efforts directed at recruiting in minority communities, in educational institutions, and from other sources from which minorities can be recruited; and (2) that the Office conduct a continuing program of (A) assistance to agencies in carrying out programs under paragraph (1) of this subsection, and (B) evaluation and oversight and such recruitment programs to determine their effectiveness in eliminating such minority underrepresentation."

5 U.S.C. §7201 (d) states that "the Equal Employment Opportunity Commission shall - (1) establish the guidelines proposed in carrying out the program required under subsection (c) of this section: and (2) make determinations of underrepresentation which are proposed to be used initially under such program; and (3) transmit to the Executive agencies involved,

to the Office of Personnel Management, and to the Congress the determinations made under paragraph (2) of this subsection."

5 C.F.R. §720.202 (a), 5 C.F.R. §720.202 (e), 5 C.F.R. §720.205 (c)

5 C.F.R. §720.202 (a) states that "Underrepresentation means a situation in which the number of women or members of a minority group within a category of civil service employment constitutes a lower percentage of the total number of employees within the employment category than the percentage of women or the minority constitutes within the civilian labor force of the United States, in accordance with section 720.205 (c) and (d)."

5 C.F.R. §720.202 (e) states that "Recruitment means the total process by which the Federal Government and the Federal agencies locate, identify, and assist in the employment of qualified applicants from underrepresented groups for job openings in categories of employment where underrepresentation has been determined. It includes both innovative internal and external recruitment actions. It is also intended to cover processes designed to prepare qualifiable applicants (those who have the potential but do not presently meet valid qualification requirements) for such job openings through programs of training, work

experience, or both."

CFR §720.205 (c) states that "Where an agency or agency component located in a geographical area where the percentage of underrepresented groups in the area civilian labor force is higher than their percentage in the national labor force, the agency or component must base its plans on the higher level of representation in the relevant civilian labor force."

Attachment 1 to FPM Letter 720-2, Office of Personnel Management (OPM), Federal Personnel Manual (FPM)

OPM Attachment 1 to FPM Letter 720-2 defines minorities as "intended to include only the following racial and ethnic categories: American Indian or Alaskan Indian, Asian or Pacific Islander, Black (not of hispanic origin), and Hispanic", in effect all descendants of peoples originating in the continents of North America, Asia, Africa, and South America, except of course descendants of peoples originating in the continent of Europe.

OPM Attachment 1 to FPM Letter 720-2 defines the basic racial and ethnic categories as follows: "(a) American Indian or Alaskan Native. A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition.

(b) Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes for example, China, Japan, Korea, the Philippine Islands, and Samoa. (c) Black. A person having origins in any of the black racial groups of Africa. (d) Hispanic. A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race."

OPM Attachment 1 to FPM Letter 720-2 further defines Hispanic origin by geographic regions of the United States such that "in the five Southwestern States (Arizona, California, Colorado, New Mexico, and Texas), the Hispanic population is identified as Spanish language or surname; in the Middle Atlantic States (New York, Jew Jersey, and Pennsylvania) as the population of Spanish language; and in the remaining 42 States and the District of Columbia, as the population of Spanish language".

OPM Attachment 1 to FPM Letter 720-2 states that "An underrepresentation determination is a comparison between (a) the percentage of a particular minority/sex in a category of Federal employment and (b) the percentage of that same group in the civilian labor force either nationally or locally." Furthermore, "agencies need to compare both national and local", (State or standard

metropolitan statistical area ("SMSA)), "civilian labor force data for each minority/sex group, and under OPM's regulations, must generally use the higher of the two percentages in making each underrepresentation determination".

OPM Attachment 1 to FPM Letter 720-2 states that "It is important to recognize that determinations of underrepresentation made in support of FEORP are based on civilian labor data without regard to the availability of minorities and women in the labor force identified as having (or potentially having) the skills needed to perform in various occupations and pay grades".

Department of Health and Human Services (DHHS) Career Opportunity Training Agreement (COTA)

DHHS COTA states that "Selection Method: Through the use of the Department of Health and Human Services Training Agreement for Career Opportunities, employees who do not meet the basic qualification requirements, as stated in the X-118 Qualification Standards, will be given the opportunity to be competitively selected for the above position."